Hartecon JV Sdn Bhd & Anor v Hartela Contractors Ltd

COURT OF APPEAL (MALAYSIA) — CIVIL APPEAL NO W-04-11-1994
GOPAL SRI RAM, NH CHAN AND VC GEORGE JJCA
2 DECEMBER 1995

Civil Procedure *— Res judicata — Decision, finality of earlier decision — Preliminary objection that opposing party adopted wrong procedure in its application for declarations — Court dismissed objection — Hearing on merit postponed to another day — Court reopened its earlier procedural ruling on day of hearing — Judge reversed his earlier decision to uphold preliminary objection — Whether matter res judicata*

The appellants and the respondent were parties to several agreements, each of which contained an arbitration clause. Disputes having arisen between them, the parties agreed to refer these to arbitration. The arbitrator appointed by the parties, by an award dated 8 December 1992, which he published on 28 December 1992 ('the arbitrator's award'), found for the appellants on the issue of liability in respect of some heads of claim. However, he declined to assess quantum, taking the view that he was not authorized to do so. The appellants were dissatisfied. In consequence of the appellants' representations to the arbitrator, on 13 May 1993, the arbitrator wrote conceding that he was mistaken in the view he had taken as to his authority, and proceeded to fix dates of hearing to assess quantum. In the meantime, on 5 February 1993, the respondent filed an application in the High Court to set aside the arbitrator's award. On 30 July 1993, the appellants took out a notice of motion claiming, inter alia, for the following relief: (i) a declaration that the arbitrator's award was an interim award on liability only; (ii) a declaration that the arbitrator was seised of jurisdiction to complete the reference to arbitration in respect of the quantum; (iii) an order that the arbitrator's award be remitted for amendment to reflect (i) and (ii) above ('the appellants' application'). Following this, the respondent, on 23 September 1993, took out a notice of motion in which it claimed an injunction restraining the arbitrator from conducting any further proceedings in the arbitration until further order ('the respondent's application'). When both the applications came on for hearing, counsel for the respondent took a preliminary objection that the appellants had adopted the wrong procedure, in that the appellants had failed to apply for the declarations by originating summons or writ, and to adopt the specific procedure as prescribed by Parliament in seeking their relief. It was further complained that the respondent's application preceded that of the appellants', and that the appellants should not be permitted to attempt a remission of the award through an unauthorized side entrance. The judge came to the conclusion that the form chosen by the appellants was not irregular, and ruled in favour of the appellants ('the first decision'). He then adjourned the hearing on merits to another date. The respondent's application was

not heard because the appellants gave an undertaking not to pursue any further proceedings before the arbitrator. When the appellants' motion came to be heard on its merits on 17 August 1994, counsel for the respondent invited the court to reopen its earlier procedural ruling. The judge acceded to this request, heard argument afresh on the point, reversed his earlier decision, upheld the preliminary objection, and dismissed the appellants' application ('the second decision'). The appellants appealed. Counsel for the respondent submitted that it was well within the powers of the judge to alter his judgment at any time before it was entered and perfected. On the other hand, the appellants' counsel contended, inter alia, that the judge had exercised his discretion wrongly in the circumstances of the present case, and that his decision would give rise to a multiplicity of proceedings. However, he conceded that the judge had jurisdiction to reverse his earlier order which had not yet been drawn up and perfected.

Held, allowing the appeal and restoring the appellants' motion to the file:

(1) Once a judge makes a ruling, substantive or procedural, final or interlocutory, it must be adhered to and may not be reopened. Although the first decision was made on an interlocutory matter which was purely procedural in nature, it was nevertheless binding on the court and on all parties to the *lis* until its reversal on appeal. The decision of the judge overruling the respondent's preliminary objection rendered the point taken res judicata (see pp 65G and 66H); *Government of Malaysia v Dato Chong Kok Lim* [1973] 2 MLJ 74 followed and *Harrison v Harrison* (1955) 1 Ch 260 distinguished.

(2) A failure to adhere to the principle of res judicata may lead to chaos in the conduct of civil proceedings. In this case, on the assumption of the law made by counsel before the court, there would have been no bar to the judge to re-review his second decision reversing himself. The process could then be repeated ad infinitum with no conclusion (see p 66E).

(3) The argument of the respondent's counsel that his application had preceded that of the appellants', and that the appellants should not be permitted to attempt a remission of the award through an unauthorized side entrance went to the merits of the motion filed by the appellants, and must be dealt with at the appropriate stage by the judge hearing the matter. To serve the interests of justice, the judge who would be assigned to this case should take both applications together, but hear and determine the respondent's motion to set aside the award first, and then proceed to hear and determine the appellants' motion (see p 67B–D).

(4) On the question of costs, the appellants were the authors of the misfortune they complained of. Accordingly, the appellants were not to have the costs of the appeal, and that the deposit paid into

court by them shall be paid out to the respondent as its costs in this court (see p 67E).

[Bahasa Malaysia summary

Perayu-perayu dan penentang merupakan pihak-pihak kepada beberapa perjanjian, yang mana setiap satu mengandungi suatu fasal timbangtara. Pertikaian telah timbul di antara mereka, dan semua pihak bersetuju merujuk pertikaian tersebut kepada timbangtara. Penimbangtara yang dilantik oleh pihak-pihak itu, melalui satu award bertarikh 8 Disember 1992, yang dia terbitkan pada 28 Disember 1992 ('award penimbangtara'), memihak kepada perayu-perayu atas isu liabiliti berkaitan dengan beberapa kepala tuntutan. Namun demikian, dia telah enggan menaksir kuantum, kerana dia berpendapat dia tidak diberikuasa untuk berbuat demikian. Perayu-perayu tidak berpuas hati. Akibat representasi perayu-perayu kepada penimbangtara, pada 13 Mei 1993, penimbangtara telah menulis kepada mereka mengakui bahawa dia tersilap dalam pandangan yang diambilnya berkenaan dengan autoritinya, dan terus menetap tarikh pembicaraan bagi menaksir kuantum. Sementara itu, pada 5 Februari 1993, penentang memfailkan satu permohonan di Mahkamah Tinggi untuk mengetepikan award penimbangtara. Pada 30 Julai 1993, perayu-perayu telah mengambil satu notis usul menuntut, antara lain, relief yang berikut: (i) satu deklarasi bahawa award penimbangtara adalah satu award interim atas liabiliti sahaja; (ii) satu deklarasi bahawa penimbangtara mempunyai bidang kuasa untuk menyelesaikan rujukan kepada timbangtara berhubung dengan kuantum; (iii) satu perintah bahawa award penimbangtara diremit untuk pindaan bagi membayangkan (i) dan (ii) di atas ('permohonan perayu-perayu'). Berikutan ini, penentang, pada 23 September 1993, telah mengambil satu notis usul di mana ia menuntut satu injunksi untuk menahan penimbangtara daripada menjalankan sebarang prosiding lanjut dalam timbangtara itu sehingga perintah selanjutnya ('permohonan penentang'). Apabila kedua-dua permohonan dibicarakan, peguam bagi penentang membuat bantahan permulaan bahawa perayu-perayu telah menerima-pakai prosedur salah, iaitu perayu-perayu telah gagal memohon untuk deklarasi melalui saman pemula atau writ, dan untuk menerima-pakai prosedur khusus seperti yang ditetapkan oleh Parlimen dalam meminta relief mereka. Selanjutnya, adalah juga dinyatakan bahawa permohonan penentang mendahului permohonan perayu-perayu, dan bahawa perayu-perayu tidak harus dibenarkan mencuba meremit award itu melalui satu cara yang tidak sah. Hakim telah membuat kesimpulan bahawa cara yang dipilih oleh perayu-perayu bukan luar aturan, dan membuat keputusan yang memihak kepada perayu-perayu ('keputusan pertama'). Beliau kemudiannya menangguhkan pembicaraan atas merit ke tarikh yang lain. Permohonan penentang tidak dibicarakan kerana perayu-perayu telah memberi satu akujanji supaya tidak

meneruskan sebarang prosiding lanjut di hadapan penimbangtara. Apabila usul perayu-perayu dibicarakan atas meritnya pada 17 Ogos 1994, peguam bagi penentang telah meminta mahkamah membuka semula perintah prosedur yang lebih awal. Hakim menyetujui permintaan ini, lalu membicarakan penghujahan semula atas perkara itu, mengakaskan keputusan lebih awal, membenarkan bantahan permulaan, dan menolak permohonan perayu-perayu ('keputusan kedua'). Perayu-perayu membuat rayuan. Peguam bagi penentang menghujah bahawa memang adalah dalam kuasa hakim untuk menukar penghakiman beliau pada bila-bila masa sebelum ia dimasuk dan disempurnakan. Sebaliknya, peguam perayu-perayu berhujah, antara lain, bahawa hakim telah melaksanakan budi bicara beliau secara salah dalam keadaan kes sekarang, dan bahawa keputusan beliau akan menimbulkan kepelbagaian prosiding. Namun demikian, peguam mengaku bahawa hakim mempunyai bidang kuasa untuk mengakas perintah lebih awal yang belum pun dibuat dan disempurnakan.

Diputuskan, membenarkan rayuan dan mengembalikan usul perayu-perayu kepada fail:

(1) Sebaik sahaja hakim membuat satu keputusan, substantif atau prosedur, muktamad atau interlokutori, ia mesti dipatuhi dan tidak boleh dibuka semula. Walaupun keputusan pertama telah dibuat atas satu perkara interlokutori yang semata-mata bersifat prosedur, ia adalah mengikat atas mahkamah dan atas kesemua pihak kepada *lis* sehingga akasan pada rayuan. Keputusan hakim menolak bantahan permulaan penentang menyebabkan perkara itu res judicata (lihat ms 65G dan 66H); *Government of Malaysia v Dato' Chong Kok Lim* [1973] 2 MLJ 74 diikut dan *Harrison v Harrison* (1955) 1 Ch 260 dibeza.

(2) Satu kegagalan untuk mematuhi prinsip res judicata boleh menyebabkan keadaan kelam-kabut dalam kelakuan prosiding sivil. Dalam kes ini, atas anggapan undang-undang yang dibuat oleh peguam di hadapan mahkamah, tidak akan terdapatnya halangan kepada hakim untuk mengkaji semula keputusan kedua mengakas dirinya. Proses itu kemudiannya boleh diulang ad infinitum tanpa kesimpulan (lihat ms 66E).

(3) Penghujahan peguam penentang bahawa permohonannya telah mendahului permohonan perayu-perayu, dan bahawa perayu-perayu tidak harus dibenarkan untuk cuba meremit award menerusi satu cara yang tidak sah, adalah berkenaan dengan merit usul yang difailkan oleh perayu-perayu, dan ia mesti dikendalikan pada tahap yang sesuai oleh hakim yang membicara perkara itu. Untuk mencapai keadilan, hakim yang akan diserahkan kes ini harus mengendalikan kedua-dua permohonan secara bersama, tetapi membicara dan menentukan usul penentang untuk mengetepikan award dahulu, dan kemudiannya

A baru membicara dan menentukan usul perayu-perayu (lihat ms 67B–D).

(4) Berkaitan dengan soalan kos, perayu-perayu adalah pencipta nasib malang yang diadu. Ekoran itu, perayu-perayu tidak patut mendapat kos rayuan, dan deposit yang dibayar kepada B mahkamah oleh mereka harus dibayar keluar kepada penentang sebagai kosnya dalam mahkamah ini (lihat ms 67E).]

Notes

For cases on res judicata, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) C paras 2892–2939.

Cases referred to

Chapman v Chapman [1954] AC 429
Cheow Chew Khoon v Abdul Johari bin Abdul Rahman [1995] 1 MLJ D 457)
Government of Malaysia v Dato Chong Kok Lim [1973] 2 MLJ 74
Harrison v Harrison (1955) 1 Ch 260.
Metal Scrap Trade Corp Ltd v Kate Shipping Co Ltd [1990] 1 WLR 115
E *Metroinvest Anstalt & Ors v Commercial Union Assurance Co plc* [1985] 2 All ER 318
Sunkyong International Inc v Malaysian Rubber Development Corp Berhad [1992] 2 MLJ 146
Sungai Wangi Estate v Uni [1975] 1 MLJ 136
Supreme General Films Exchange Ltd v Singhji AIR 1975 SC 1810
F *Sykt Kenderaan Melayu Kelantan Bhd v Transport Workers' Union* [1995] 2 MLJ 317
Tan Sri Hj Othman Saat v Mohamed bin Ismail [1982] 2 MLJ 177
Ting Ling Kiew & Anor v Tang Eng Ironworks Co Ltd [1992] 2 MLJ 217

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Legislation referred to

Arbitration Act 1952
Rules of the High Court O 2 rr 1(1), (2)
Specific Relief Act 1950 s 41
H Supreme Court Practice 1993 Vol 1 [UK]

Appeal from: Originating Summons No R2–25–18–1993 (High Court, Kuala Lumpur)

I *Rajendra Navaratnam (Azman Davidson & Co)* for the appellants.
Lim Chor Pee (Looi Teh Sung with him) *(Albar Zulkifly & Yap)* for the respondent.

Cur Adv Vult

Gopal Sri Ram JCA (delivering the judgment of the court): This appeal concerns certain proceedings consequent upon an arbitration between the appellants and the respondent. The matter arose in this way. A

The appellants and the respondent were parties to several agreements, each of which contained an arbitration clause. Disputes having arisen between them, the parties agreed to refer these to arbitration. For the purposes of this appeal, it is unnecessary to go into the events that preceded the making of the award or the nature of the claims made by the parties against each other. Suffice to say that the arbitrator appointed by the parties, by an award dated 8 December 1992, which he published on 28 December 1992, found for the appellants (plaintiffs in the arbitration) on the issue of liability in respect of some heads of claim, but disallowed certain others. However, he declined to assess quantum, taking the view that he was not authorized to do so. So, for all practical purposes, the findings on the issue of liability was an interim award. The appellants were dissatisfied with the arbitrator's refusal to adjudicate on the issue of quantum of damages. They entered into correspondence with him on this matter. We will not reproduce it here. In consequence of representations made to him by the appellants, the arbitrator, on 13 May 1993, wrote conceding that he was mistaken in the view he had taken as to his authority and proceeded to fix dates of hearing to assess quantum. B C D

In the meantime, on 5 February 1993, the respondent filed an application in the High Court to set aside the arbitrator's award of 28 December 1992. On 30 July 1993, the appellants took out a notice of motion in which they claimed the following relief: E

(i) A declaration that the award made in the above captioned references to arbitration between the parties and dated the 8th day of December 1992 is an interim award on liability only; F

(ii) A declaration that the arbitrator in the above captioned references to arbitration between the parties, Dato Dr Peter Mooney, having made and published an interim award on liability dated the 8th day of December 1992 has the jurisdiction and authority to do all things necessary to complete the above captioned references to arbitration such that a quantified final award may be made and published and is not functus officio until the said final award is made and published. G

Further or alternatively,

An Order granting an extension of time to extend the period within which the respondents are required to apply to remit the award published by the arbitrator dated the 8th day of December 1992 pursuant to s 23 of the Arbitration Act 1952 be extended to the date of filing of this application: and H

An Order that the award made between the parties to the above-mentioned arbitration, dated the 8th day of December 1992 be remitted for amendment to reflect clearly that I

(a) the award was an interim award on liability only; and

(b) the arbitrator is seised of jurisdiction to complete the reference to arbitration in respect of the quantum portion.

A (iii) An Order that the costs of and incidental to this application be paid by the applicant.

(iv) Further or other relief.

Following this, the respondent, on 23 September 1993, took out a notice of motion in which it claimed an injunction restraining the arbitrator from B conducting any further proceedings in the arbitration until further order.

When the appellants' application and that of the respondent claiming injunctive relief came on for hearing on 13 October 1993, counsel for the respondent took a preliminary objection as to the correctness of the procedure employed by the appellants. The learned judge, having heard C argument on the point, ruled against the respondent and adjourned the hearing on merits to another date. The respondent's application for an injunction was not heard because the appellants gave an undertaking not to pursue any further proceedings before the arbitrator.

When the appellants' motion came to be heard on its merits on D 17 August 1994, counsel for the respondent invited the court to reopen its earlier procedural ruling. The learned judge acceded to this request, heard argument afresh on the point, reversed his earlier decision, upheld the preliminary objection and dismissed the appellants' application. It is against that decision of the learned judge that the present appeal was brought.

In supporting the appeal, counsel for the appellant conceded that the E learned judge had jurisdiction to reverse his earlier order because it had not yet been drawn up and perfected. He however argued that the learned judge had exercised his discretion wrongly in the circumstances of the present case. In support of this submission, counsel cited the decision in *Harrison v Harrison* (1955) 1 Ch 260.

F In *Harrison*, certain orders were made on the premise that the judge had jurisdiction to make it. Subsequently, the House of Lords in *Chapman v Chapman* [1954] AC 429, held that a judge had no power to make such orders. The orders in *Harrison* had not been perfected and drawn up as at the date on which the House pronounced judgment in *Chapman*. Roxburgh J who had heard the matter recalled the summonses on which the orders G had been made and dismissed them. An appeal against his decision failed, the English Court of Appeal holding that the judge was entitled to act as he did because the orders had not been perfected.

Counsel argued that this was not a case where the judge lacked jurisdiction to overrule the preliminary objection. In truth, he had ample H jurisdiction to do so. He went on to distinguish *Harrison* on the ground that the orders there made were final in nature whereas the present ruling was entirely procedural in nature. We must say at once that we are unable to accept this distinction made by counsel. If there is jurisdiction to recall an order before it is perfected, then that jurisdiction is exercisable whether I the order is final or interlocutory, procedural or substantive.

Counsel's further submission is that the decision of the learned judge will give rise to a multiplicity of proceedings. He referred us in this behalf to the decision in *Metal Scrap Trade Corp Ltd v Kate Shipping Co Ltd*

[1990] 1 WLR 115. With respect, that case has little relevance to the present appeal because it concerned an originating summons that claimed a declaration that there was no arbitration agreement between the parties.

The final submission advanced by counsel was that the procedure adopted by the appellants was not irregular, and that in any event it had caused no prejudice to the respondent. In support of this argument, we were referred to three authorities, namely, *Metroinvest Anstalt & Ors v Commercial Union Assurance Co plc* [1985] 2 All ER 318 (an authority which this court has had the occasion to discuss in *Cheow Chew Khoon v Abdul Johari bin Abdul Rahman* [1995] 1 MLJ 457), *Sungai Wangi Estate v Uni* [1975] 1 MLJ 136 which this court has since overruled in *Sykt Kenderaan Melayu Kelantan Bhd v Transport Workers' Union* [1995] 2 MLJ 317, *Tan Sri Hj Othman Saat v Mohamed bin Ismail* [1982] 2 MLJ 177 and *Supreme General Films Exchange Ltd v Singhji* AIR 1975 SC 1810. The last two cases are authority for the proposition that s 41 of the Specific Relief Act 1950 is not exhaustive, and that declaratory judgments may be granted in situations not covered or envisaged by the section.

In responding to the submissions made on behalf of the appellant, Encik Lim of counsel for the respondents, argued that it was well within the powers of the learned judge to alter his judgment at any time before it was entered and perfected. In support of this submission, counsel read to us the following passage appearing under para 42/1/4 in Vol 1 the English Supreme Court Practice 1993:

> *Effect of judgment before entry* — A judgment takes effect from the time when the judge pronounces it, and the subsequent entry of it is a mere form in obedience to the direction of the Court (*Holtby* v *Hodgson* [1889] 24 QBD 103). But it is within the powers of a judge to alter his judgment at any time before it is entered and perfected (*Re St Nazaire Co* (1879) 12 Ch D 88; *Re Suffield and Watts* [1888] 20 QBD 693); and the disclosure to him of a payment into Court does not affect this right (*Millensted* v *Grosvenor House Ltd.* [1937] 1 KB 71 CA).

Counsel, in our view, correctly argued that it did not matter whether the order in question was final or interlocutory, and that the principle contended for applied to both types of orders. In arguing that, the appellants had adopted the wrong procedure in this case, counsel formulated the following propositions which we set out below:

(1) An application for a declaration must be made by originating summons or writ;

(2) There is no room for a counterclaim in originating motion proceedings under the Arbitration Act 1952;

(3) If parliament has prescribed a specific procedure for obtaining a relief or remedy, then, a party must adopt that procedure in seeking that relief. The court will not in the exercise of its discretion grant a declaration in such cases. If the application is countenanced, it would have the effect of obtaining a remission of the award.

While we recognize that counsel on both sides have taken care and pains in advancing interesting arguments covering a wide area of the law relating

to declaratory relief, we are spared the task of dealing with the submissions in detail or from examining the authorities cited by them because of the route which we have chosen to arrive at our decision in this appeal.

We take first the complaint that the appellants had chosen the wrong procedure. Were we free to express an opinion on the matter we may well be minded to say, in reliance upon the decision in *Metroinvest Anstalt & Ors v Commercial Union Assurance Co plc* [1985] 2 All ER 318, that there is a discretion in a court whether to permit a proceeding irregularly commenced to be continued or quashed. However, we are in no position to do so because we are required by the doctrine of stare decisis to act in obedience to two decisions of the Supreme Court which we read as having concluded the matter in the appellants' favour. They are *Sunkyong International Inc v Malaysian Rubber Development Corp Bhd* [1992] 2 MLJ 146 and *Ting Ling Kiew & Anor v Tang Eng Ironworks Co Ltd* [1992] 2 MLJ 217.

In *Sunkyong*, there appears the following passage on the effect of O 2 rr 1(1) and (2):

> The second point was the failure of the local defendant to state in its affidavit supporting its application for leave to serve out of jurisdiction that in its belief, it had a good cause of action. In our view, this omission could not amount to anything more than a mere failure to comply with a rule of the High Court in regard to form and content of an affidavit, an irregularity curable by costs *without any need for any amendment herein,* vide O 2 rr 1(1) and (2) of the Rules of the High Court 1980. Costs to be dealt with later would be the only appropriate term to be imposed for allowing the proceeding to remain. (Emphasis added.)

But, as we have earlier said, we choose to decide this appeal on quite a different basis. It is this. The learned judge, on 13 October 1993, was faced with an objection as to the form of proceedings which had been adopted by the appellants. He came to the conclusion that the form chosen by the appellants was not irregular. Although that was a decision made on an interlocutory matter which was purely procedural in nature it was nevertheless binding on the court and on all parties to the *lis* until its reversal on appeal. In our judgment the decision of the learned judge overruling the respondent's preliminary objection rendered the point taken res judicata.

If authority is needed for the proposition which has commended itself to us, it is to be found in *Government of Malaysia v Dato Chong Kok Lim* [1973] 2 MLJ 74 which was drawn to the attention of counsel during argument and in which there appears the following passage in the judgment of Sharma J (at p 76):

> In *Satyadhyan Ghosel & Ors* v *Sint Deorajin Dobi and another* AIR 1960 SC 941, the statement of the law on the subject is given thus:
>
> > 'The principle of res judicata is based on the need of giving a finality to judicial decisions. What it says is that once a *res* is *judicata*, it shall be not adjudged again. Primarily it applies as between past litigation and future litigation. When a matter — whether on a question of fact or a

question of law — has been decided between two parties in one suit or proceeding and the decision is final, either because no appeal was taken to a higher court or because the appeal was dismissed, or no appeal lies, neither party will be allowed in a future suit or proceeding between the same parties to canvass the matter again. This principle of res judicata is embodied in relation to suits in s 11 of the Code of Civil Procedure; but even where s 11 does not apply, the principle of res judicata has been applied by courts for the purpose of achieving finality in litigation. The result of this is that the original court as well as any higher court must in any future litigation proceed on the basis that the previous decision was correct.

The principle of res judicata applies also as between two stages in the same litigation to this extent that a court, whether the trial court or a higher court having at an earlier stage decided a matter in one way will not allow the parties to re-agitate the matter again at a subsequent stage of the same proceedings.'

A decision given by a court at one stage on a particular matter or issue is binding on it at a later stage in the same suit or in a subsequent suit. (See *Peareth* v *Marriott* (1883) 22 Ch D 182, *Hook* v *Administrator-General of Bengal & Ors* LR 48 IA 187 and *Re Trusts of the Will of Tan Tye (Deceased) Yap Liang Neo* v *Tan Yew Ghee and Another* [1936] MLJ 141 at pp 147–151). Parties cannot raise a second time in the same suit an issue that has already been determined either expressly or by necessary implication. (See *Louis Dreyfus* v *Aruna Chalayya* LR 58 IA 381).' (Emphasis added.)

A failure to adhere to the principle expressed in the judgment of Sharma J just quoted may lead to chaos in the conduct of civil proceedings. The facts of this very case afford a good illustration of such a consequence. We have here an earlier decision by the judge upon a procedural issue determining it in the appellants' favour. Then along comes the respondent at the adjourned hearing and applies to the judge to reopen the issue and review his earlier decision. The judge obliged and reversed himself. What was there to prevent the appellants from then an application to the judge to re-review his decision reversing himself? On the assumption of the law made by counsel before us, there would have been no bar to the judge undertaking such an exercise. The process could then be repeated ad infinitum with no conclusion. It would be a circular tail chasing exercise with no forward movement, proving to the man on the street that the maxim 'the law is an ass' is not without content. The absurd results that would ensue in accepting the contention of counsel demonstrates the inaccuracy of the propositon advanced.

We cannot over emphasize the proposition that once a judge makes a ruling, substantive or procedural, final or interlocutory, it must be adhered to and may not be reopened willy-nilly. One may then ask: how is this approach to be reconciled with the decision in *Harrison*? The answer to that question lies in recognizing that the principle for which that case is authority applies only where it is demonstrated that the court plainly lacked jurisdiction to make the order complained of: provided, of course, that the order in question has not been drawn up and perfected. To extend the scope of that principle would be to effectively demolish the requirements

of certainty and finality which are the two pillars on which the judicial process rests.

In these circumstances, we are unable to accept the common ground on which counsel on both sides stood. We therefore had no alternative but to allow the appeal and to restore the appellants' motion to the file.

But that is not the end of the matter because we had to pay heed to Encik Lim's complaint that his application had preceded that of the appellants' and that they should not be permitted to attempt a remission of the award through an unauthorized side entrance. The arguments advanced by counsel go to the merits of the motion filed by the appellants and must be dealt with at the appropriate stage by the judge hearing the matter.

Having given this matter our most anxious consideration, we formed the view that the interests of justice will be best served if we direct the judge who will be assigned this case (the judge who made the earlier decision being no longer available to hear the matter) to take both applications together, but that he shall hear and determine the respondent's motion to set aside the award first and then proceed to hear and determine the appellants' motion.

On the question of costs, we were of the view that the appellants are the authors of the misfortune they complain of. Accordingly, we ordered that that the appellants are not to have the costs of the appeal and that the deposit paid into court by them shall be paid out to the respondent as its costs in this court. The order as to costs made by the High Court was affirmed.

Order accordingly.

Reported by Isabel Liong